Message

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Sent: 5/7/2018 12:47:24 PM
To: Johnson, Barnes [Johnson.Barnes@epa.gov]; Devlin, Betsy [Devlin.Betsy@epa.gov]; elliot.ross@epa.gov
Subject: [SPAM-Sender] Coal Ash
Attachments: NAMABComments-EPA CCR Rule Amendments04262018.docx; RKinchCCRComments.docx

Barnes, Betsy, and Ross,

I hope you are all doing well. FYI, I did submit comments on the coal ash proposed amendments, one via the National Ash Management Advisory Board (document 1k2-92tc-pw3e), and also some personal comments (document 1k2-92vc-2pt2) – copies attached. When looking at the proposal, I could not help but see things through my old EPA regulator perspective. From that view I would like to personally share some general thoughts…

- **Certifications** – There are important pieces of flexibility that are introduced, but there may be limited availability due to being constrained to States with EPA approved CCR programs. When EPA opened up, in the original rule, certifications for some items by qualified professional engineers, there was no reason that States could not provide similar certifications with or with EPA approved programs. The issue is whether there is a benefit to a certification and whether there is an entity that can appropriately provide a certification. EPA could take on the burden themselves, but likely doesn't want to assume that responsibility. States (even without EPA approved CCR programs) and others are well equipped provide certifications. For example, States were already approved to make these types of calls for municipal solid waste landfills; the Office of Water's Comprehensive State Ground Water Protection and Well Head Protection programs support States developing alternative groundwater protection standards; and Oklahoma's CCR program approval prior to these amendments would still allow Oklahoma to exercise the added regulatory flexibility if the proposal is finalized. Constraining the additional flexibility to EPA approved State CCR programs is not about need, or capability, but rather what kind of paperwork is accepted. My sense is that this issue is not a legal restriction, but rather a policy call. I see States (without an EPA approved CCR program) as extremely capable of making certifications associated with the additional regulatory flexibility and warranting EPA trusting its regulatory partner.
- **Supporting Data/Analysis** – Allowing reduced corrective action procedures for actions taking place in less than 180, appears to be raised without any data or analysis. Granted the timeframe for developing the proposal was limited, but one could have quickly looked at corrective actions, how long they took, and their severity to decide on an appropriate timeframe. When numerical regulatory criteria are specified, it is troublesome to toss out opinion based criteria and ask for comments. This will largely drive others to provide opinions. As indicated in my comments, the timeframe was the wrong direction to address the issue, but when proposing numerical criteria, there really should be a obligation to provide some data and analysis.
- **Precedent** – The proposal affirms a regulatory interpretation that the language "This Subpart does not apply to practices which meet the definition of beneficial use of CCR." doesn't really mean what it says. This is an important legal interpretation which warrants some precedential support. There are lots of EPA regulations that have very similar "This Subpart does not apply.." language, and I know of no circumstance where the interpretation is consistent with that for beneficial use of CCR. A very analogous situation is the no liquids in MSWLFs provision. Later the Agency issued a provision for bioreactors, which indicated that if the MSWLF met the bioreactor conditions that the no liquids in MSWLF provision would not apply. So MSWLFs cannot add liquids, but can if it meets bioreactor conditions. This is no substantive different from the prohibition against adding CCR under certain conditions and the beneficial use exemption. (The main difference is the beneficial use exemption is more encompassing, but that doesn't justify a different reading.) Senior levels in OGC should be asked to reconsider the interpretation and provide appropriate examples of precedent to support a decision.
- **Knowledge** – For the provisions on beneficial use of CCR during closure, there is an array of specific criteria. Since leaving EPA, I have been at a decent amount of conferences addressing pond closure, as well as discussions on industry plans. I appreciate the complexities and am humbled by the breath of expertise that is addressing pond closure practices. Given the proposed provisions, the lack of reports, data, and analysis and what appears to be a lack of elementary understanding, I am left with the possibility that no one at EPA has

visited and examined a collection of CCR pond closures, and there was no contractor assessment of CCR closure designs. In this case, the more appropriate solution is for EPA to make a consistent interpretation regarding the "This Subpart does not apply…" beneficial use language – still, there is the general observation that EPA staff needed to be out in the field seeing closure actions and other activities related to potential regulatory action. While staff is very capable, it is of critical importance to understand their level of expertise and provide them with the prerequisite experiences prior to creating intricate regulatory criteria – such as that for beneficial use of CCR for closure.

In principle, I expect you value and respect State programs, believe in data and analysis supporting provisions, see regulatory interpretations as needing to be consistent with precedents, and providing staff with appropriate experiences. While I recognize that any critique may generate a negative reaction, I hope these general observations are of value for future regulatory efforts.